Nos. 87-2012, 87-2051, and 88-49

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FW/PBS, INC., *et al.*,
Petitioners,
v.

CITY OF DALLAS, *et al.*,
Respondents.

M.J.R., INC., *et al.*,
Petitioners,
v.

CITY OF DALLAS, *et al.*,
Respondents.

CALVIN BERRY, III, *et al.*,
Petitioners,
v.

CITY OF DALLAS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a city may preclude persons who recently have been convicted of certain specified sexual offenses from operating a sexually oriented business.
2. Whether a city may impose special regulations on sexually oriented businesses in an effort to alleviate the secondary effects associated with such businesses, such as increased crime and declining property values.
3. Whether the licensing requirements imposed by Dallas on sexually oriented businesses effect an unconstitutional prior restraint.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

These cases present First Amendment challenges to the validity of a Dallas ordinance imposing licensing requirements on "sexually oriented businesses." The issues presented are important to *amici* and their members because they concern the constitutional limitations on state and local government efforts to protect the morals, health, and safety of their citizens from urban blight and crime.

The Court has previously upheld local government regulation directed at the secondary effects of sexually oriented businesses. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court upheld zoning restrictions aimed at businesses of this character. *See also Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). The licensing requirements in this case represent another attempt to deal with this pernicious problem.

The licensing requirements at issue in this case, although they differ in character from zoning restrictions, impose no greater restrictions on the ability of creators of sexually oriented material to reach their audience or the ability of the public to obtain access to sexually oriented fare. In fact, in many of their applications, these regulations have considerably less direct impact on First Amendment rights than did the zoning regulation upheld in *Renton*; the Dallas ordinance applies to a wide range of business activities, some of which (*e.g.*, adult motels) are completely unconcerned with freedom of expression.

The City's effort is not to restrain speech, but to exercise some control over businesses engaged in the commercial exploitation of sex, and thus to inhibit the criminal activity and health risks frequently associated

with such exploitation. The licensing requirements may be compared to similar requirements imposed on other lawful business activities (*e.g.*, liquor stores, dance halls, pawn shops) that can attract criminal elements. They are narrowly tailored to the City's strong public interest in mitigating the undesirable secondary effects associated with such businesses, without inhibiting the freedom to publish or receive, and without attempting to regulate the content of, First Amendment communications. The licensing requirements in this case do not vest in any official discretionary power that could result in censorship or suppression of particular First Amendment expression (*cf. City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988)).

Amici submit that the decision below is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, they submit this brief to assist the Court in its resolution of the issues presented.[1]

STATEMENT

A. Introduction and Description of the Dallas Ordinance

These consolidated cases involve several challenges to the constitutionality of a Dallas ordinance that regulates the conduct of sexually oriented businesses. The ordinance, Chapter 41A of the Dallas City Code (reproduced in its current, amended form at J.A. 8-37), defines the term "sexually oriented businesses" to include the following nine kinds of commercial enterprise: (1) adult arcades; (2) adult bookstores or adult video stores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theaters; (6) adult theaters; (7) escort agencies; (8) nude model studios; and (9) sexual encounter centers. Section 41A-2(19) (J.A. 14) and Section 41A-3 (J.A. 15). The ordinance also defines separately each of these kinds of sexually oriented business. Section 41A-2(1)-(6), (9), (12), and (18) (J.A. 9-13).

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[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk of the Court.

The ordinance requires a license for the operation of sexually oriented businesses and specifically identifies the circumstances in which a license will not be granted. Sections 41A-4 and 41A-5 (J.A. 16-20). The ordinance also limits the locations in which sexually oriented businesses may be conducted (Sections 41A-13 and 41A-14 (J.A. 26-30)), and it establishes particular regulatory requirements for certain kinds of sexually oriented businesses and for the exhibition and display of sexually explicit films, videos, and other materials (Section 41A-15 to 41A-20 (J.A. 30-35)).

The ordinance was originally adopted in June 1986, by unanimous vote of the Dallas City Council, acting on the unanimous recommendation of the Dallas City Plan Commission. Pet. App. 41.[2] Public comments at a City Council hearing on the Plan Commission's recommendation unanimously favored adoption of the proposed ordinance. *Ibid.*

The purpose of the ordinance is "to promote the health, safety, morals, and general welfare of the citizens of [Dallas], and . . . to prevent the continued concentration of sexually oriented businesses within the city." Section 41A-1(a) (J.A. 8-9). As the legislative history shows, and as the district court found (Pet. App. 42), Dallas sought to "control[] the secondary effects of sexually oriented businesses on surrounding neighborhoods." In addition, the City sought to protect the patrons of such establishments and the citizenry in general from unsanitary and unsafe conditions. Dallas wished to reduce the crime frequently associated with sexually oriented businesses, to deter the spread of urban blight, and to preserve property values. *Id.* at 43. The City Council "did not intend to limit access by adults to sexually oriented material protected by the first amendment." *Ibid.*

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-2012.

B. The Initiation of These Consolidated Actions

Immediately after the ordinance was adopted, petitioners sued to enjoin its enforcement. Between June 30 and July 17, 1986, three lawsuits were filed in the United States District Court for the Northern District of Texas.

Plaintiffs in the first case, petitioners in No. 87-2012, are numerous corporations and individuals that operate businesses in Dallas selling, exhibiting, or distributing sexually explicit publications, videotapes, or motion picture films. The businesses operated by these petitioners fall within one or more of several of the categories of sexually oriented businesses enumerated in the Dallas ordinance, including adult arcades, adult bookstores or adult video stores, adult motion picture theaters, and adult theaters.

Plaintiffs in the second case, petitioners in No. 87-2051, are corporations that operate "nightclubs" in Dallas where they present "entertainment programs" that consist of "semi-nude dancing." Amended Complaint ¶¶ 1, 9. The businesses operated by these petitioners fall within the "adult cabaret" category of sexually oriented businesses, as defined in the Dallas ordinance. M.J.R. Br. at 2; J.A. 10.

Plaintiffs in the third case, petitioners in No. 88-49, are owners and operators of motels in Dallas that rent their motel rooms for various periods of time, including two-hour increments. The businesses operated by these petitioners fall within the "adult motel" category of sexually oriented businesses, as defined in the Dallas ordinance. Berry Br. at 4; J.A. 10-11.

Petitioners mounted a blunderbuss constitutional challenge to the ordinance, alleging that nearly every provision in Chapter 41A violates one or more of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments. The complaint in No. 87-2012, for example, contained more than 80 separate paragraphs or subparagraphs that purported to identify various constitutional flaws in part or all of the challenged ordinance. As the

district court observed (Pet. App. 45), however, petitioners' "main attack" focused on the ordinance's zoning restrictions on the location of sexually oriented businesses. Section 41A-13 (J.A. 26-28).

C. The District Court's Decision

The district court disposed of all three complaints on cross-motions for summary judgment (Pet. App. 39-70). The court sustained the validity of the Dallas ordinance, with the exception of four relatively minor provisions that have since been deleted or amended and are not at issue here.

Having reviewed the record of the ordinance's consideration by the City Plan Commission and the City Council, the district court found that "[t]he intent of the City in passing the Ordinance was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself" (Pet. App. 42). The court considered the interests that the ordinance was intended to serve, including "crime control, protection of property values, and prevention of urban blight," and found that those interests are "both important and substantial" (*id.* at 47). The court further found that "[t]he legislative response to the secondary effects of sexually oriented businesses evinced a clear intent to leave alternative avenues open for expression of that genre, while lessening the effects of such businesses on the surrounding community" (*id.* at 47-48).

Based on these findings, and relying on this Court's decisions in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the district court upheld the zoning restrictions in the Dallas ordinance in their entirety. Pet. App. 48-49. The court also found "no constitutional impediment to the concept of requiring sexually oriented businesses to obtain licenses and pay reasonable fees" (*id.* at 50; footnotes omitted).

Turning to the specific features of the Dallas licensing scheme, the district court ruled that the ordinance's license eligibility criteria and licensing procedures are generally valid. Pet. App. 50-55.

In particular, the court upheld the basic concept of Section 41A-5(a)(10) of the ordinance, which makes licenses unavailable, for a specified period of years, to persons who have been convicted of any of an enumerated list of felony or misdemeanor offenses.[3] The court said that "denial of licensure to those convicted of certain specified crimes that are related to the crime-control intent of the law is undoubtedly permitted" (Pet. App. 53). The court decided, however, that five of the crimes enumerated in the ordinance as originally adopted were not "sufficiently related to the purpose of the ordinance to withstand scrutiny" (*ibid.*).[4] The court also ruled that the ordinance could not properly direct that licenses be withheld from persons "under indictment or misdemeanor information" for (but not recently convicted of) any of the enumerated offenses. *Id.* at 53-54, 83. A month after the district

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[3] The waiting period imposed by the ordinance is five years from conviction or release from confinement for felonies and multiple misdemeanor offenses, and two years from conviction or release from confinement for single misdemeanor offenses. Section 41A-5(a)(10)(B) (J.A. 19-20).

[4] The enumerated offenses that the court found "clearly related" to the purposes of the ordinance include prostitution; promotion of prostitution; aggravated promotion of prostitution; compelling prostitution; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault or aggravated sexual assault; incest, solicitation of a child, or harboring a runaway child; and criminal attempt, conspiracy, or solicitation to commit any of the foregoing. Pet. App. 53; J.A. 19.

The five enumerated offenses that the court found "not sufficiently related" to the purposes of the ordinance were "(1) a controlled substance act violation, (2) bribery, (3) robbery, (4) kidnapping, [and] (5) organized criminal activity" (Pet. App. 53; see also *id.* at 107).

court's decision, the Dallas City Council amended the ordinance to delete those portions of Section 41A-5(a)(10) that the court had held invalid. Pet. App. 106-107.

With respect to the procedures established by the ordinance for granting or denying sexually oriented business licenses, the district court held that "the largest part of the licensure section is constitutional" (Pet. App. 52). The court explained that, with two minor exceptions, "[t]he findings the police chief must make in licensing sexually oriented businesses are based on objectively determinable facts, and are thus permissible" (*ibid.*)

The two exceptions to this general conclusion, in the court's view, were Sections 41A-5(a)(8) and 41A-5(c). The first of these provisions required the police chief to deny a license to any applicant who

> has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and *has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.*

(Pet. App. 83; emphasis added). The second provision dealt with license applications from persons convicted of one of the specific offenses enumerated in the ordinance. Under Section 41A-5(c), such a person could be granted a license, after the prescribed waiting period following his conviction, but only if the police chief determined that he was "presently fit" to operate a sexually oriented business. The section listed several factors that the police chief was to consider in making his determination of "present fitness."

The district court found that both Section 41A-5(a)(8) and Section 41A-5(c) required the police chief "to make subjective judgments on the fitness of an applicant" (Pet. App. 51), and the court therefore held that the two subsections "vest unfettered discretion in the police chief, and cannot survive constitutional scrutiny" (*id.* at 52). Since the district court's decision, the Dallas City Council has deleted the "present fitness" requirement from Sec-

tion 41A-5(c) and has modified Section 41A-5(a)(8) so as to limit the disqualification based on inability to operate a sexually oriented business "in a peaceful and law-abiding manner" to circumstances in which an applicant's recent operation of such a business has "necessitat[ed] action by law enforcement officers." Pet. App. 106, 108-109; J. A. 18, 20.

Finally, the district court rejected numerous vagueness and overbreadth challenges to the ordinance's definitions of the various categories of sexually oriented businesses and other terms, and the court upheld the ordinance's various restrictions on the "operation, layout, design, and furnishing" of regulated businesses. Pet. App. 55-57.

D. The Court of Appeals' Decision

The court of appeals affirmed the district court's decision. Pet. App. 1-30. The court began by addressing petitioners' contention that the ordinance's licensing requirement is invalid under *Freedman v. Maryland*, 380 U.S. 51 (1965), because of three alleged procedural deficiencies (Pet. App. 5):

> it places the burden of proof upon the licensee to prove that a license was wrongfully denied; it fails to provide for prompt determination of the appeal; and it fails to provide assurance of a "prompt final judicial determination."

In rejecting this argument, the court observed that the Dallas ordinance regulates ongoing commercial enterprises, not the content of individual books or films. *Id.* at 8-9. Unlike the state statute invalidated in *Freedman*, which prohibited the exhibition of any motion picture not first submitted to and approved by the State Board of Censors, the Dallas ordinance does not ban the publication, distribution, or exhibition of any film, writing, or other form of expression.

In holding that the Dallas ordinance does not trigger the procedural requirements of *Freedman*, the court of appeals relied heavily on *City of Renton v. Playtime*

Theatres, Inc., 475 U.S. 41 (1986). Pet. App. 7-9. The court observed that the challenged ordinance "regulates only the secondary effects of sexually oriented businesses," and that under *Renton* a city may regulate such secondary effects without engaging in the kind of "content-based" regulation that would activate the procedural safeguards in *Freedman*. *Id.* at 8.

The court of appeals also sustained the zoning restrictions in the Dallas ordinance. The court found that the ordinance furthers a substantial government interest in maintaining the quality of urban life and that the ordinance "allows reasonable alternative avenues of communication" (Pet. App. 9). Under these circumstances, the court had little difficulty in concluding that the Dallas zoning is valid, under the principles enunciated in *Renton*.

The court of appeals next rejected challenges to several specific features of the licensing system established by the ordinance. The court characterized the ordinance's prohibition against granting licenses to persons recently convicted of certain enumerated crimes as "a form of disability commonly attending convictions" (Pet. App. 12), and it found that under the amended ordinance "[i]neligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses" (*id.* at 13). Having found that "[t]he relationship between the offense and the evil to be regulated is direct and substantial," the court concluded that the ordinance's mandatory waiting period following an applicant's conviction for an enumerated crime is constitutionally acceptable. *Ibid.*

Similarly, the court of appeals found no constitutional problem with the degree of discretion exercised by the chief of police under the amended ordinance (Pet. App. 13-14); the authorization in Section 41A-7 for police, health, fire, and building inspections of sexually oriented businesses at any time such a business is "occupied or open for business" (*id.* at 14); the requirement in Sec-

tion 41A-19 that viewing booths for films and video cassettes be open to direct view from the manager's station (*id.* at 11); or the classification as an adult motel of any establishment that offers a sleeping room for rent for a period of less than 10 hours (*ibid.*).

Judge Thornberry concurred in part and dissented in part. Pet. App. 17-30. He dissented only with respect to those sexually oriented businesses that, in his view, "directly implicate the First Amendment, such as the adult book stores, adult video stores, and adult motion picture theaters" (*id.* at 17). Even as to these businesses, Judge Thornberry dissented from only three aspects of the majority's decision. Although he agreed with the majority that the Dallas ordinance is "content-neutral" because "it can be justified by a desire to fight crime and urban blight—interests unrelated to the suppression of particular speech" (*id.* at 19-20; see also *id.* at 23), Judge Thornberry nevertheless sought to distinguish the Dallas licensing system from the zoning ordinance upheld in *Renton* (*id.* at 22-23). In his view, "[t]he denial of a license is a complete ban on speech" (*id.* at 23) and "the classic prior restraint" (*id.* at 19). For that reason, he concluded, the licensing ordinance cannot be analyzed as a mere "time, place, and manner restriction," and the procedural protections described in *Freedman* must apply. *Id.* at 18-19, 23-25.

Judge Thornberry also dissented with respect to Section 41A-7's authorization of inspections of sexually oriented businesses and with respect to the requirement in Section 41A-5(a)(6) that applicants for licenses to operate such businesses be approved by the health, fire, and building departments as being in compliance with applicable law. Pet. App. 25-26. He would have held these provisions unconstitutional because, he said, they are applicable only to sexually oriented businesses, not to businesses generally.

Finally, Judge Thornberry would have invalidated Section 41A-5(a)(10), the provision that makes licenses

unavailable for a period of years following an applicant's conviction of any of several enumerated sexual offenses. Pet. App. 27-28. He stated that the burden imposed by this provision is a heavy one and that the restriction should not be permitted in the absence of strong evidence that allowing recently convicted sex offenders to operate sexually oriented businesses would surely result in direct, immediate, and irreparable damage. *Id.* at 28.

E. Proceedings in This Court

After the court of appeals' decision, petitioners moved in this Court for "recall and stay" of the mandate of the court of appeals. It is not at all clear why petitioners wanted a stay of the mandate. Even before the court of appeals' decision, Dallas was free to enforce its amended ordinance, and the court of appeals' decision did not change the status quo. Staying the mandate therefore should have had no practical effect. Nonetheless, petitioners sought this relief, and, on May 4, 1988, the Court stayed the judgment of the court of appeals, "except for its holding that the provisions of the ordinance regulating the location of sexually-oriented businesses do not violate the Federal Constitution" (Pet. App. 38). Although the stay, by its terms, does not seem to limit the City's ability to enforce its ordinance, Dallas appears to have interpreted the stay as an injunction against such enforcement. Since the entry of the stay, therefore, Dallas apparently has enforced only the zoning restrictions, not the licensing provisions, of the disputed ordinance.

In February 1988, this Court granted the petitions for certiorari in all three cases. The Court limited its grant of review so as to exclude those questions in No. 87-2012 and No. 87-2051 that sought to challenge the Dallas zoning restrictions. Pet. App. 7.

SUMMARY OF ARGUMENT

Although their arguments are multifarious, petitioners essentially contend that Chapter 41A violates the First Amendment in three ways. First, petitioners argue that the provisions denying licenses to certain convicted criminals infringe a First Amendment right of those criminals to operate sexually oriented businesses. Second, petitioners argue that Chapter 41A as a whole impermissibly treats sexually oriented businesses differently from other businesses through its special licensing and inspection requirements. Finally, petitioners argue that Chapter 41A effects an unconstitutional "prior restraint" on speech both in requiring licenses and in permitting license denial under the circumstances specified in the ordinance.

I.

Those provisions of the Dallas ordinance that forbid persons recently convicted of certain crimes from operating sexually oriented businesses do not infringe petitioners' First Amendment rights. Chapter 41A was enacted pursuant to the City's police power to regulate for the purpose of protecting and promoting public health and safety. A well-established incident of this police power is the right to bar from certain occupations persons who have committed crimes. Thus, a person responsible for the operation of a sexually oriented business should not have a recent history of committing sex crimes because, as the Dallas City Council found in this case, an individual in such a profession would be faced with repeated opportunities for recidivism.

The First Amendment's principal concern is to protect the freedom to speak and to listen, to read and to write, to express and to receive a broad spectrum of views and messages. The First Amendment is not primarily concerned with protecting the profit-making activities of commercial enterprises. As operators of sexually oriented businesses, petitioners are neither creators nor recipients of expression. They are merely intermediaries, persons

seeking to sell sexually explicit materials or performances. But, for First Amendment purposes, one vendor of such fare is the same as the next. Protected material is amply available in Dallas in sexually oriented businesses not operated by convicted criminals.

Furthermore, there is no record that any individual petitioner has been denied a license to operate because he or she has been convicted of one of the enumerated offenses. And, of course, Chapter 41A does not abridge in any way the First Amendment interest of any person, convicted sex offender or not, to create or to receive sexually explicit fare.

Because the restriction against convicted sex offenders affects those persons exclusively and because it affects only their economic interests, the restriction ought to be analyzed under the Equal Protection Clause of the Fourteenth Amendment, not as an infringement of fundamental rights. The "occupational disability" imposed by the Dallas ordinance is rationally related to the legitimate state interest of protecting public safety. Petitioners themselves do not argue to the contrary.

II.

Chapter 41A does not impermissibly discriminate against sexually oriented businesses by subjecting them to licensing and other requirements. Such businesses are historically, and on this record, associated with crime, including prostitution, and with casual sexual liaisons that implicate the corresponding health risk of sexually transmitted disease. Thus, the requirement of licensing, regulations governing the layout of booths where sexually explicit videos are shown, and the requirement that sexually oriented businesses permit inspection by police, health, and other municipal departments, are all directly related to the peculiar problems and characteristics associated with sexually oriented businesses.

III.

The fact that the Dallas ordinance requires sexually oriented businesses to be licensed and permits applications for such licenses to be denied under specified circumstances does not make Chapter 41A an unconstitutional prior restraint. Impermissible prior restraints fall within one of two categories. Some unconstitutional prior restraints impermissibly vest broad licensing discretion in an official. Others seek to screen protected material, thus allowing censorship. Chapter 41A falls within neither category. No section vests licensing discretion in the licensing official, who is required to issue a license within 30 days if certain objectively ascertainable criteria are met. No section authorizes screening or censorship of sexually oriented speech.

Licenses are denied under Chapter 41A not because of any particular material sold in a sexually oriented business but because of a proprietor's failure to comply with the ordinance. With the exception of the temporary disqualifications applicable to convicted sex offenders, compliance is entirely within the control of the license applicant at the time of application. If an applicant is denied a license, he need only conform to the requirements of Chapter 41A. Accordingly, the procedural requirements mandated when the content of speech or expression is reviewed before publication are not implicated by Chapter 41A.

ARGUMENT

I. THE CONSTITUTION DOES NOT CONFER UPON CONVICTED SEX OFFENDERS THE RIGHT TO OPERATE SEXUALLY ORIENTED BUSINESSES

Petitioners first challenge the constitutionality of those provisions of the Dallas ordinance that prevent criminals convicted of certain crimes from obtaining licenses to operate sexually oriented businesses.[5] Petitioners argue

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[5] In addition to Section 41A-5(a)(10), which makes sexually oriented business licenses unavailable to persons recently convicted of any enumerated offense, Section 41-A-10(b)(5) requires that an

that these provisions effect an "absolute ban upon future protected expression" and that the ordinance therefore "bears a 'heavy presumption against its constitutional validity.'" M.J.R. Br. at 34 (*quoting Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980)); FW/PBS Br. at 12-20. But this argument assumes the answer to the question at issue: whether a person recently convicted of one or more sexual offenses has a First Amendment right to operate a sexually oriented business.

A. A City's Broad Police Power To Protect The Health And Safety Of Its Citizens Encompasses The Right To Ban Convicted Criminals From Certain Occupations

The offenses that temporarily disable certain recently convicted criminals from obtaining licenses are sexual offenses. They include, *inter alia*, sexual assault, prostitution and related offenses, obscenity, and offenses involving child pornography or sexual activity with children. J.A. 18-19.[6] A person convicted of any of these crimes may not obtain a license to operate a sexually oriented business for five years in the case of a felony or multiple misdemeanors, or two years in the case of a single misdemeanor. *Id.* at 19-20.

The Dallas City Council found that the enumerated sex crimes "render a person unable, incompetent, and unfit" to operate a sexually oriented business "in a manner that would promote the public safety and trust" (Pet. App. 74). The reason is that, as a licensed operator, such a person would be faced with "repeated opportunities" to commit additional offenses. *Id.* at 73. Because this would pose a very real threat to public safety

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existing license be revoked if it is determined that the licensee has been convicted of an enumerated offense for which the prescribed waiting period following the conviction has not elapsed. J.A. 23.

[6] Each of the offenses enumerated in the Dallas ordinance is defined in the Texas Penal Code, the relevant sections of which are cross-referenced in Chapter 41A.

and health, the City Council determined that a temporary disqualification from obtaining a license is desirable. *Id.* at 73-74.

As the City's findings make explicit, the sexually oriented business ordinance was enacted pursuant to the City's police power to regulate certain businesses and professions for the purpose of protecting and promoting public health and safety. Pet. App. 71. A well-established incident of this governmental power is the right to bar from certain occupations or activities persons who have committed certain crimes.

In *Hawker v. New York*, 170 U.S. 189 (1898), for example, this Court upheld New York State's permanent ban against granting physicians' licenses to persons who had committed felonies. In permitting such disqualification, *Hawker* relied directly on "'[t]he power of the state to provide for the general welfare of its people.'" *Id.* at 194 (quoting *Dent v. West Virginia*, 129 U.S. 114, 122 (1889)). The Court found that it was within the State's police power to "prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine." 170 U.S. at 191.[7]

The Dallas City Council found a direct relationship between the enumerated offenses and "the ability, capacity, or fitness required to perform the duties and dis-

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[7] Of course, the legitimate exercise of this aspect of the police power is not restricted to the exclusion of persons from professions involving the provision of health care. This Court has upheld disqualifications of certain classes of persons, including criminals, from other occupations. For example, in *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), the Court sustained the Transit Authority's ban on the employment of drug users, including those on methadone maintenance programs. Similarly, in *De Veau v. Braisted*, 363 U.S. 144 (1960), the Court upheld a New York law disqualifying convicted felons from waterfront union employment. "Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas." *Id.* at 158-59.

charge the responsibilities of the licensed occupation" (Pet. App. 73). The City could reasonably conclude that a person responsible for operating a business focused predominantly on sex should not have a recent history of committing sex crimes. " 'It cannot be doubted that the legislature has authority, in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be trusted witn the discharge of its duties.' " *Hawker v. New York*, 170 U.S. at 194 (quoting *State v. State Medical Examining Board*, 32 Minn. 324, 327, 20 N.W. 238, 240 (1884)).[8] *See also Richardson v. Ramirez*, 418 U.S. 24 (1974) (sustaining one of the many state statutes that deny convicted felons the right to vote).

B. The Principal Concern Of The First Amendment Is The Free Flow Of Expression, Not The Commercial Exploitation Of Sexually Explicit Material By Convicted Criminals

Petitioners' challenge to the licensing restrictions that Dallas imposes on certain convicted criminals does not deny the City's legitimate interest in protecting its citizens or the City's power to do so. Indeed, petitioners seem to acknowledge that the City has a "substantial governmental interest in controlling crime" (FW/PBS Br. at 20). Nevertheless, petitioners contend (*ibid.*), Dallas may not deny licenses to convicted criminals unless the City first shows that direct, immediate, and irreparable damage will result if the ordinance's temporary disqualification is not imposed.

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[8] Notwithstanding petitioners' argument to the contrary (M.J.R. Br. at 23-24, 27-33), this rule is equally applicable when the crime in question is obscenity, rather than a crime that directly threatens the physical safety of the public. Like the other enumerated offenses, the crime of obscenity involves past conduct that the Dallas City Council could reasonably find renders a person unfit to sell sexually explicit material. Certainly, the operation of sexually oriented businesses provides "repeated opportunities" to commit the crime again.

Petitioners try to justify this position by vastly exaggerated assertions of their First Amendment interest in operating sexually oriented businesses. Petitioners repeatedly claim that the ordinance "will result in the absolute suppression of . . . protected First Amendment activity" (*id.* at 23), but they completely ignore the highly tenuous relationship between their commercial enterprises and the core concerns underlying the First Amendment's guarantees. As the courts below recognized, the Dallas ordinance should be evaluated on the basis of a realistic appraisal of its practical effects, not on the basis of petitioners' inflated rhetoric.

While the ordinance has little or no impact on any legitimate First Amendment interest of convicted criminals, it contributes substantially to the City's salutary goals of protecting the health and welfare of the public, reducing crime, and preserving property values. The ordinance imposes no restriction whatever on the right of convicted criminals or members of the public generally to send or receive any message they wish. Neither creators nor consumers of expression are affected. Any tangential First Amendment interest that petitioners may have in the commercial exploitation of sexually explicit materials by convicted criminals cannot displace the City's indisputable substantial interest in regulating sexually oriented businesses for the common good.

The First Amendment was designed to protect the right of a creator to reach his audience. "The central concern of the First Amendment . . . is that there be a free flow from creator to audience of whatever message a film or a book might convey." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 77 (1976) (Powell, J., concurring); *see also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("the protection afforded is to the communication, to its source and to its recipients both"). The constitutional guarantee of free speech " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *New*

York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

Outlets where protected material may be sold and purchased may be necessary for the "free flow of information from creator to audience." It is, however, a giant step from this point to petitioners' premise that all persons, including recently convicted sex offenders, must have an unqualified right to sell all materials arguably entitled to First Amendment protection.

Here, it is uncontested that there are ample outlets in Dallas for persons to purchase sexually explicit books or films or to watch live or filmed performances of similar content. This is therefore not a case about whether certain information or expression may be disseminated. The issue is solely whether persons recently convicted of particular crimes may operate a particular kind of commercial enterprise.

Young v. American Mini Theatres is instructive in this regard. There, the Court sustained an ordinance that forced the relocation of two "adult" movie theatres. The Court rejected the argument that the ordinance created an impermissible restraint on protected communications, noting that "[t]here is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare." 427 U.S. at 62. No such claim exists on this record either.

Petitioners (and the criminals they seek to protect) are neither creators nor consumers of expression. They are intermediaries engaged in the business of selling sexually oriented material, for the sole end of making money. Petitioners, like the adult movie theater operators in *American Mini Theatres*, are nothing more than "commercial purveyors[s]. They do not profess to convey their own personal messages through the movies they show, so that the only communication involved is that contained

in the movies themselves." 427 U.S. at 78 n.2 (Powell, J., concurring).

The First Amendment is not concerned with commercial selling for its own sake.

> The inquiry for First Amendment purposes . . . looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them? . . . At most the impact of the ordinance on these interests is incidental and minimal.

Young v. American Mini Theatres, 427 U.S. at 78 (Powell, J., concurring). As Justice Powell's opinion makes clear, any significant First Amendment concern with ordinances regulating the commercial distribution of sexually explicit fare must focus on the rights of the creators of such material and their audience. The Dallas ordinance temporarily bars some convicted criminals from operating sexually oriented businesses, but for First Amendment purposes the important point is that sellers are fungible. And there is an ample number of such sellers in Dallas.

By petitioners' own admission (FW/PBS Br. at 6), the only showing on this record is that one out of 165 license applicants was denied a license because of an obscenity conviction, and that denial was reversed by the Permit and License Appeal Board. Two out of 165 applicants had their licenses revoked because of obscenity convictions, and 147 out of 165 license applications were granted. Affidavit of Steven Foster (submitted to this Court as an attachment to the City's response to petitioners' application for stay and recall of mandate).[9]

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[9] Contrary to petitioners' suggestion (FW/PBS Br. at 7), the Foster affidavit does not describe the disposition of the remainder of the 165 license applications.

The Dallas ordinance therefore does not have the effect of suppressing or restricting access to lawful speech. *See Young v. American Mini Theatres*, 427 U.S. at 71 n.35 (plurality opinion). "Viewed as an entity, the market for this commodity is essentially unrestrained." *Id.* at 62 (opinion of the Court).

C. The Occupational Disability Created By Chapter 41A Constitutes A Permissible Statutory Discrimination

Because it affects only former criminals and is imposed because of their particularly demonstrated threat to society, and because it affects not their right to free speech but only their economic interests, the temporary "occupational disability" imposed by Chapter 41A is properly analyzed under the Equal Protection Clause of the Fourteenth Amendment and not as an infringement of fundamental rights.[10]

In the areas of economics and social welfare, a classification will be upheld if it has some reasonable basis and if it bears a rational relationship to a permissible state objective. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). "[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). "'A statutory discrimination will not be set aside [under the Equal Protection Clause] if any state of facts reasonably may be conceived to justify it.'" *Dandridge v. Williams*, 397 U.S. at 485 (quoting *McGowan v. Maryland*, 366 U.S. at 426). This standard "has consistently been ap-

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[10] *Cf. Lewis v. United States*, 445 U.S. 55, 67 (1980) (characterizing 18 U.S.C. § 1201's prohibition of possession of firearms by felons to be a "civil firearms disability, enforceable by a criminal sanction").

plied to state legislation restricting the availability of employment opportunities." *Dandridge v. Williams*, 397 U.S. at 485. Thus, in *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), this Court upheld, as consonant with the Equal Protection Clause, the New York City Transit Authority's ban on the employment of drug users, including those on a methadone maintenance program.

> [T]he "no drugs" policy now enforced by TA is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists. Accordingly, an employment policy that postpones eligibility until the treatment program has been completed, rather than accepting an intermediate point on an uncertain line, is rational. It is neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass.

Id. at 591-92 (footnote omitted). Similarly, in *Hawker v. New York*, 170 U.S. at 196, the Court found that:

> When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject matter, but is only appealing to a well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state?

Petitioners do not and could not contend that the provisions of Chapter 41A temporarily disqualifying persons convicted of sexual offenses from operating sexually oriented businesses are not "rationally related" to the legitimate state interest of protecting public safety. The correlation between sexually oriented businesses and an increased incidence of crime is well established, as the

Dallas City Council found. That should be the end of the matter. "It is by . . . practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered." *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949).

II. CHAPTER 41A DOES NOT IMPERMISSIBLY DISCRIMINATE AGAINST SEXUALLY ORIENTED BUSINESSES

Petitioners also argue that Chapter 41A impermissibly treats sexually oriented businesses differently from other businesses, thus allegedly imposing a "content based" restriction on the exercise of First Amendment rights. This Court's recent decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), effectively answers this contention.

In *Renton*, the Court reviewed a zoning ordinance that applied exclusively to adult motion picture theaters. Relying on *Young v. American Mini Theatres*, the Court held that, "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." 475 U.S. at 49. In the Court's view, even though the ordinance singled out adult theatres for regulation, it was nevertheless appropriate to test the ordinance's validity under a content-neutral standard. The Court explained that "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" *Id.* at 48 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 771) (emphasis in *Renton*).

The same reasoning applies here. As the Dallas City Council made clear, Chapter 41A was motivated by a desire to regulate the secondary effects of sexually

oriented businesses, not by a desire to muzzle a particular kind of speech. The ordinance's focus on businesses that purvey a certain kind of material therefore does not discriminate impermissibly against a form of expression protected by the First Amendment.

Chapter 41A imposes nothing more than reasonable time, place, and manner restrictions on sexually oriented businesses. With the exception of the temporary disqualification of certain convicted criminals, no ordinance section provides for denial of a license on grounds that cannot be avoided or cured by a license applicant at the time of application. Such "content-neutral" time, place, and manner regulations "are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 47. Chapter 41A satisfies both of these criteria.

As discussed above, Chapter 41A was designed to serve the substantial state interest of protecting public health and safety. Here, as in *Renton* (*see* 475 U.S. at 51), the City acted on the basis of substantial evidence concerning the adverse secondary effects of sexually oriented businesses. And Chapter 41A leaves open ample alternative avenues of communication. The ordinance does not restrict in any way the number or kind of sexually oriented businesses that may operate. Nor does it attempt to regulate the protected material that may be sold there. Under the standards enunciated in *Renton*, the Dallas ordinance should be sustained.[11]

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[11] With respect to petitioners in No. 88-49, operators of "adult motels," the argument that Chapter 41A impermissibly discriminates against sexually oriented businesses fails for an additional and perhaps even more fundamental reason. The regulation of such businesses does not implicate First Amendment concerns at all, and special licensing requirements for motels that rent rooms for periods shorter than ten hours cannot possibly be "content based." Renting a motel room for a two-hour interval is not itself expression, and the fact that people may associate with each other

Petitioners' attempted reliance on *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), is misplaced. There, the Court "struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax had the effect of singling out newspapers to shoulder its burden." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986). The Court found the newsprint and ink tax unconstitutional because "differential treatment, unless justified by some special characteristic . . ., suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." 460 U.S. at 585.

Here, although Chapter 41A obviously "singles out" sexually oriented businesses for regulation, the differential treatment imposed by the ordinance upon such businesses is "justified by some special characteristic." It is in fact justified by several "special characteristics" associated with sexually oriented businesses, including increased crime, increased incidence of sexually transmitted disease, diminished property values, and urban blight. Pet. App. 72-73. The affected entities here are businesses historically associated with crime and other adverse secondary effects, not newspapers historically associated with free speech. Significantly, petitioners have not challenged the City Council's findings, based on "convincing documented evidence," that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution, and for casual sexual liaisons, that "a substantial number of arrests for sexual crimes have been made" in such establishments,

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or express themselves inside a motel room does not mean that the City may not legitimately decide that motels that permit short-term rentals require special regulation. The Dallas ordinance imposes no limits on either "intimate association" or "expressive association," as those terms have been used in this Court's recent decisions, and the ordinance's application to adult motels therefore raises no constitutional issue. *See City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

and that such businesses are associated, among other things, with increased crime. Pet. App. 71-72.

The same rationale also answers petitioners' challenge to the "open booths" section of the ordinance, Section 41A-19 (J.A. 32-35), and the municipal code compliance and administrative inspection sections, Sections 41A-5 (a)(6) and 41A-7 (J.A. 21). As the court of appeals held, "[t]he City could reasonably conclude that closed booths encourage illegal and unsanitary sexual activity in adult theatres." Pet. App. 11. Similarly, the fact that sexually oriented businesses often are open late at night and at odd hours justifies the provision permitting inspections at any time the business is open, rather than only during the hours when most other businesses are open.

III. CHAPTER 41A DOES NOT IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT

Petitioners' briefs are laden with rhetoric regarding the Dallas ordinance's alleged unconstitutional prior restraint on protected speech. The kernel of petitioners' argument is that all laws that require licenses and that permit license denial are presumptively unconstitutional prior restraints. See, *e.g.*, M.J.R. Br. at 10-12, 16, 22.

Petitioners are incorrect. "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957). The Constitution does not require absolute freedom to exhibit protected material at all times and places. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). As the Court held in *Young v. American Mini Theatres*, "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to . . . licensing requirements is not a sufficient reason for invalidating these ordinances." 427 U.S. at 62.

Every one of the cases that petitioners cite regarding unconstitutional prior restraints can be distinguished from this case on one of two grounds. Some unconstitu-

tional prior restraints impermissibly vest broad licensing discretion in an official who has the power unilaterally to revoke or deny a license on bases not articulated in the licensing legislation or not verifiable by reference to objective facts. *E.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). Other unconstitutional prior restraints require screening and thus threaten to exclude potentially protected material without certain procedural safeguards, such as expeditious judicial review of any such exclusion. *E.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965). The problems inherent in each of these kinds of prior restraint are absent from Chapter 41A.

The Dallas ordinance does not vest impermissibly broad discretion in any licensing official. Under Section 41A-5, the licensing official is required to approve the issuance of a license within 30 days unless he finds one or more of several objectively ascertainable facts. J.A. 17-20. Similarly, under Section 41A-9 (J.A. 22-23), which governs suspension of licenses, and under Section 41A-10 (J.A. 23-25), which governs license revocation, the licensing official *must* suspend or revoke the license involved if he finds any of the objectively ascertainable ordinance violations specified in those sections.

Petitioners object in particular to Section 41A-5(a)(8), which, as amended after the district court's decision, requires the denial of a license application filed by a person who, while employed in a sexually oriented business during the 12 months before the application, "has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers" (J.A. 18). See M.J.R. Br. at 41-42. Petitioners' argument that this provision permits the exercise of unbridled discretion ignores the section's final clause: "thus necessitating action by law enforcement officers."

This language, which was added to Section 41A-5(a)(8) after the district court invalidated the original ver-

sion of that provision, follows the same approach that the City adopted in the original version of the corresponding license suspension provision, Section 41A-9(5), a provision that the district court expressly sustained. Pet. App. 65 n.29. The district court specifically suggested that the excessive discretion found in the original version of Section 41A-5(a)(8) could be cured by amending the provision to require "action by law enforcement officers," as in Section 41A-9(5). Pet. App. 66 n.31. That is exactly what the Dallas City Council did. *Id.* at 106. The resulting provision does not confer unfettered discretion; it is "limited by its language to certain objective indications of an ability to operate a business peacefully" (*id.* at 65 n.29). Petitioners have not identified a single instance of allegedly improper discretionary action under this or any other provision of the ordinance.

Nor is Chapter 41A objectionable as a prior restraint that screens potentially protected speech. In *Arcara v. Cloud Books, Inc.*, an "adult bookstore," where solicitation of prostitution and other forms of illicit sexual activity had been found to have occurred, was closed under a New York nuisance statute. This Court overturned the New York Court of Appeals' finding that the closure order constituted a prior restraint. The Court explained (478 U.S. at 705 n.2):

> The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials since respondents are free to carry on their bookselling business at another location . . . . Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

Like the closure order upheld in *Arcara*, Chapter 41A does not prohibit or restrain the dissemination of par-

ticular materials or any materials at all.[12] It follows that any license revocation or denial in Dallas would be based not upon the dissemination of protected materials but upon noncompliance with the provisions of Chapter 41A. That is precisely the kind of situation in which the special procedural requirements outlined in *Freedman v. Maryland*, 380 U.S. 51 (1965), are not implicated.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[12] Petitioners seize upon *Arcara*'s observation that "*respondents* are free to carry on their bookselling business at another location" (emphasis added). Petitioners argue that, as to those convicted criminals who may not operate a sexually oriented business for up to five years, the ordinance clearly effects a prior restraint. FW/PBS Br. at 23; M.J.R. Br. at 23-27. As already discussed, however, and as the quoted language from *Arcara* implies, the First Amendment protects materials offered for sale, not a convicted criminal's right to operate a sexually oriented business. In *Near v. Minnesota*, 283 U.S. 697 (1931), a prior restraint statute forbidding a publisher from issuing future editions of his newspaper both suppressed the newspaper and "put the publisher under an effective censorship." *Id.* at 712. Here, neither publisher nor publication is being suppressed or censored. The Dallas ordinance does not in any way restrict publication by particular persons or the sale of specific materials. The only thing foreclosed is operation of a sexually oriented business by persons recently convicted of certain sexual offenses. Any materials that could be sold by such a person can, of course, also be made available in sexually oriented businesses operated by persons who have not been convicted.